UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of All Others Similarly Situated, *Plaintiff*, -against- INDEPENDENCE ENERGY GROUP LLC, and INDEPENDENCE ENERGY ALLIANCE LLC, *Defendants*.	1:12-cv-01369-WFK-VMS

MEMORANDUM OF LAW IN MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION, AND VACATURE, OF THE ORDER OF DISMISSAL DATED MARCH 12, 2013

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of All Others Similarly Situated, *Plaintiff*, -against- INDEPENDENCE ENERGY GROUP LLC, and INDEPENDENCE ENERGY ALLIANCE LLC, *Defendants*.	1:12-cv-01369-WFK-VMS

INTRODUCTION

Plaintiff, Todd C. Bank, submits this Memorandum of Law in support of his motion, pursuant to Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure, for an Order: (1) granting reconsideration of, and vacating, the Order of this Court, dated March 12, 2013, which *sua sponte* dismissed the Complaint based upon lack of subject-matter jurisdiction (D.E. 16); and (2) granting Plaintiff any additional relief authorized by law.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this class action on March 19, 2012. Plaintiff alleged that Defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), specifically the provision of the TCPA that provides that "it shall be unlawful . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B).

On July 27, 2012, Defendants served a motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Federal Rules") for failure to state a claim based solely on its position that Plaintiff's telephone number was a home-business number and was therefore not protected by the statute, which applies only to residential telephone lines (D.E. 12). On March 12, 2013, this Court *sua sponte* dismissed the Complaint based not upon the argument that Defendant had moved upon, but instead upon lack of subject-matter jurisdiction (Order, D.E. 16).

REVIEW OF THIS COURT'S ORDER

This Court based its holding upon two elements of Second Circuit case law. First, this Court noted that "[t]he Second Circuit has unequivocally held 'that state courts have exclusive jurisdiction over private actions under the TCPA and ... that, pursuant to 28 U.S.C. § 1331, *federal courts lack federal question jurisdiction over such claims*.' *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006) (citing *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998)) (internal quotation marks omitted)." Order at 3 (emphasis added).

Second, this Court noted that "[t]he Second Circuit has also unequivocally held that § 901(b) of New York Civil Practice Law and Rules ('Section 901(b)') bars TCPA class actions in federal court. *See Holster III v. Gatco, Inc.*, 618 F.3d 214, 217-18 (2d Cir. 2010) ('Congress intended to give states a fair measure of control over solving the problems that the TCPA addresses. The ability to define when a class cause of action lies and when it does not is part of that control.'), *aff'g on remand from*, 130 S.Ct. 1575, ___ U.S. ___ (2010), *cert. denied*, 131 S.Ct. 2151 (2011)." Order at 3.

The provision of the TCPA that was the basis of the Second Circuit case law upon which this Court relied states that, "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." 47 U.S.C. § 227(b)(3) ("Private-Right-of-Action Provision" or "PROA Provision").

As set forth in Points I and II, *infra*, each of the two aforementioned elements of the Second Circuit case law was subsequently abrogated by the Supreme Court in *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 565 U.S. ___ (2012).

REVIEW OF THE SECOND CIRCUIT CASE LAW RELATING TO THE TCPA

In Foxhall, *supra*, the Second Circuit held, based on the PROA Provision, that there is no federal-question jurisdiction over TCPA claims. *See Foxhall*, 156 F.3d at 434 ("we . . . reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by [the TCPA]" (citation and quotation marks omitted); *see also id.* at 435-438 (explaining its decision based on the PROA Provision and the court's interpretation of the federal-question-jurisdiction statute, 28 U.S.C. § 1331). In *Gottlieb*, *supra*, the Second Circuit noted that "[o]ur ruling in *Foxhall* . . . related only to the existence of *federal question* jurisdiction over private TCPA claims; we did not consider in that case whether federal courts have *diversity* jurisdiction over such claims that but are subject to diversity jurisdiction." *Gottlieb*, 436 F.3d at 336 (emphases added). *Gottlieb* proceeded to hold that TCPA claims are subject to diversity jurisdiction. *See id.* at 339 ("[w]e reject the argument that Congress's failure to provide explicitly for concurrent jurisdiction in [the PROA Provision] means that the provision precludes federal courts from exercising diversity jurisdiction over private TCPA claims."); *see also id.* at 340-341 "[the diversity jurisdiction statute, 28 U.S.C.] § 1332[,] applies to all causes of action, whether created by state or federal law, unless Congress expresses a clear intent to the contrary. . . . Here, there is no clear statement of congressional intent to divest the federal courts of diversity jurisdiction over private TCPA claims.").

In *Bonime v. Avaya, Inc.*, 547 F.3d 497 (2d Cir. 2008), which arose out of a TCPA diversity class action in which diversity was predicated upon 28 U.S.C. § 1332(d)(2) of the Class Action

Fairness Act, the Second Circuit held, based on the PROA Provision, that the action was subject to Section 901(b) of the New York Civil Practice Law and Rules ("CPLR"), which prohibits class actions in New York state courts from seeking statutory damages.

Bonime's holding was based on two grounds. First, the court interpreted the PROA Provision to mean that, although the TCPA was a federally created statute, it "functionally operates as state law," *Bonime*, 547 F.3d at 501, and is thus subject to the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), such that, in diversity actions, those claims are governed by state substantive law, which, *Bonime* found, includes CPLR § 901(b). *See id.* at 500-502.

The second ground of *Bonime* was as follows:

> A second, independent reason reinforces th[e] conclusion [that CPLR § 901(b) applies to TCPA claims in New York federal courts]. The private right of action created by the TCPA allows a person or entity to, "if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State," an action for a violation of the TCPA. *See* 47 U.S.C. § 227(b)(3). This statutory language is unambiguous—a claim under the TCPA cannot be brought if not permitted by state law. . . . This provision constitutes an express limitation on the TCPA which federal courts are required to respect.

Id. at 502. On the same day that *Bonime* was issued, the Second Circuit issued a Summary Order in the companion case of *Holster v. Gatco, Inc.*, 2008 U.S. App. Lexis 23203 (2d Cir. Oct. 31, 2008), in which the issue and result were identical to those of *Bonime*, and in which the court relied exclusively upon *Bonime* as the basis for its identical holding. *See id.* at *1.

During the pendency of the plaintiff's *certiorari* petition in *Holster*, the Supreme Court held, in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 559 U.S. ___ (2010), that CPLR § 901(b) was inapplicable in a federal diversity action in New York that had sought statutory damages under a New York law even though CPLR § 901(b) would have precluded class certification if the case had been brought in a New York state court. The Court's holding was based on the rule that the *Erie* doctrine is inapplicable where the state law in question, *i.e.*, CPLR § 901(b) in *Shady Grove*, conflicts with federal procedural rules, and upon the Court's finding that CPLR § 901(b) conflicts with Federal Rule 23. *See Shady Grove*, 130 S.Ct. at 317-319.

Following *Shady Grove*, the Supreme Court granted the *certiorari* petition in *Holster*, vacated the Second Circuit's Summary Order, and remanded the matter to the Second Circuit to issue a new ruling in light of *Shady Grove*. *See Holster v. Gatco, Inc.*, 130 S.Ct. 1575 (2010). On remand, the Second Circuit acknowledged that *Bonime*'s first "ground, predicated on *Erie*, [was] abrogated by *Shady Grove*." *Holster v. Gatco, Inc.*, 618 F.3d 214, 216 (2d Cir. 2010). However, the Second Circuit reaffirmed its original ruling, doing so on the basis that *Shady Grove* had not abrogated the second ground of *Bonime*. *See id.* at 217-218.

ARGUMENT

POINT I

THE SUPREME COURT ABROGATED THE SECOND CIRCUIT CASE LAW THAT HAD HELD THAT TCPA CLAIMS ARE NOT SUBJECT TO FEDERAL-QUESTION JURISDICTION

In *Mims*, *supra*, the Supreme Court held that there *is* federal-question jurisdiction over TCPA claims, thereby abrogating *Foxhall*, *supra*, which had held the opposite. *See Mims*, 132 S.Ct. at 745 ("[w]e find no convincing reason to read into the TCPA's permissive grant of jurisdiction to state courts any barrier to the U.S. district courts' exercise of the general federal-question jurisdiction they have possessed since 1875. We hold, therefore, that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA" (citations omitted)).

POINT II

THE SUPREME COURT ABROGATED THE SECOND CIRCUIT CASE LAW THAT HAD HELD THAT TCPA CASES ARE SUBJECT TO STATE-LAW RESTRICTIONS, INCLUDING SECTION 901(b) OF THE NEW YORK CIVIL PRACTICE LAW AND RULES

A. TCPA Claims in Federal Court are Governed Exclusively by Federal Law

In *Mims*, *supra*, the Supreme Court made it perfectly clear that state laws and state rules of court do not apply to private TCPA actions brought in federal courts: "[b]eyond doubt, the TCPA is a *federal law* that both creates the claim [that the plaintiff] has brought and *supplies the substantive rules that will govern the case*." *Mims*, 132 S.Ct at 744-745 (emphases added). As *Mims* further noted, the TCPA is a "federal law [that] creates the right of action and *provides the rules of decision*." *Id.* at 748 (emphasis added). Accordingly, the Court explained that one's right to bring a TCPA *does not depend on state law to any degree whatsoever*:

> . . . Congress . . . could have passed a statute providing that out-of-state telemarketing calls directed into a State would be subject to the laws of the receiving State. Congress did not enact such a law. Instead, it enacted *detailed*, *uniform*, *federal substantive* prescriptions and provided for a regulatory regime administered by a federal agency. *See* 47 U.S.C. § 227. TCPA liability thus depends on violation of a *federal statutory requirement* or an FCC regulation, § 227(b)(3)(A), (c)(5), *not* on a violation of any *state substantive law*.
>
> The federal interest in regulating telemarketing to "protec[t] the privacy of individuals" while "permit[ting] legitimate [commercial] practices," 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings) (internal quotation marks omitted), is evident from the regulatory role Congress assigned to the FCC. See, *e.g.,* § 227(b)(2) (delegating to the FCC authority to exempt calls from the Act's reach and prohibit calls to businesses). *Congress' design would be less well served if consumers had to rely on "the laws or rules of court of a State*," § 227(b)(3) [*i.e.*, the PROA Provision], or the accident of diversity jurisdiction, to gain redress for TCPA violations.

Mims, 132 S.Ct at 751 (footnote omitted; emphases added) *see also id.* at 753 ("federal law gives rise to [a] [TCPA] claim [] and specifies the substantive rules of decision.").

Insofar as the Second Circuit had supported its interpretation of the PROA Provision based on what the court perceived to be the purpose of the TCPA viz-à-viz the states, the Supreme Court again came to the opposite conclusion. In *Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 593 (2d Cir. 2011), *cert pet. granted vac'd, and remanded* for further consideration in light of *Mims*, 2012 WL 1884741, (U.S., No. 11-1411, Oct. 1, 2012), the Second Circuit, in holding that state law supplies the statute of limitations to TCPA diversity claims, found as follows:

> The purpose of the TCPA was to assist those states—then numbering forty—that had enacted legislation to protect their residents from unsolicited commercial telecommunications by filling *a perceived jurisdictional gap* for interstate communications that states might not otherwise be able to reach. . . . *see generally Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd.,* 156 F.3d 432, 437 (2d Cir. 1998) (discussing TCPA legislative history). In providing the "interstitial law" necessary to "prevent[ ] evasion of state law by calling across state lines," Congress chose to make a TCPA action the "*functional equivalent of a state law*," applicable *only as otherwise permitted by state law and court rules*. *Gottlieb v. Carnival Corp.,* 436 F.3d 335, 342 (2d Cir.2006) (Sotomayor, J.); *see also Bonime v. Avaya, Inc.,* 547 F.3d at 503 (Calabresi, J., concurring) (discussing application of canon of construction pertaining to limiting clauses to [the PROA] [P]rovision). In thus delimiting TCPA actions, Congress placed *no restrictions on the state laws or court rules that must be satisfied*. Rather, the "as permitted" requirement is unqualified.

Giovanniello, 660 F.3d at 592-593 (emphases added). The Supreme Court, however, rejected the notion that the TCPA was a "jurisdictional gap" filler that left federal-court TCPA claims subject to state law:

> We are *not persuaded* . . . that Congress sought only to *fill a gap* in the States' enforcement capabilities. Had Congress so limited

> its sights, it could have passed a statute providing that out-of-state telemarketing calls directed into a State would be subject to the laws of the receiving State. Congress did not enact such a law. Instead, it enacted *detailed*, *uniform*, *federal substantive* prescriptions and provided for a regulatory regime administered by a federal agency. *See* 47 U.S.C. § 227. TCPA liability thus depends on violation of a *federal statutory requirement* or an FCC regulation, § 227(b)(3)(A), (c)(5), *not* on a violation of any *state substantive law.*

Mims, 132 S.Ct at 751 (emphases added).

B. Case Law Following *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 565 U.S. ___ (2012), has Unanimously Held that TCPA Claims Brought under Federal-Question Jurisdiction are not Subject to State Law

Numerous District Courts have recognized that, under *Mims*, state laws have no application to TCPA claims brought under federal-question jurisdiction. *See Landsman & Funk PC v. Skinder-Strauss Associates*, 2012 WL 6622120 (D. N.J. Dec. 19, 2012), *recons. denied*, 2013 WL 466448 (D. N.J. Feb. 8, 2013) (holding CPLR § 901(b) does not apply to a New York plaintiff's TCPA class action); *Bridging Communities, Inc. v. Top Flite Financial, Inc.*, 2013 WL 185397 at *6 (E.D. Mich. Jan. 17, 2013) (holding that Michigan's counterpart to CPLR § 901(b) does not apply to a TCPA class action); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, 2012 WL 4903269 at *5-*7 (D. N.J. Oct. 17, 2012) (holding CPLR § 901(b) does not apply to a New York plaintiff's TCPA class action); *Bank v. Spark Energy Holdings, LLC*, 2012 WL 4097749 at *2-*3 (S.D. Tex. Sept. 13, 2012) (same); *Jackson's Five Star Catering, Inc. v. Beason*, 2012 WL 3205526 at *3-*4 (E.D. Mich. July 26, 2012) (holding that Michigan's counterpart to CPLR § 901(b) does not apply to a TCPA class action); *American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*, 2012 WL 3027953 at *2 (W.D. Mich. July 24, 2012) (same); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 2012 U.S. Dist. LEXIS 85663 at *9-*10 (W.D. Mich. June 21, 2012) (same); *Bailey v. Domino's Pizza,* *LLC*, 2012 WL 1150882 at *3-*19 (E.D. La. Apr. 5, 2012) (holding that federal law supplies the statute of limitations to TCPA claims); *Hawk Valley, Inc. v. Taylor*, 2012 WL 1079965 at *19-*39 (E.D. Pa. Mar. 30, 2012) (same); *St. Louis Heart Center, Inc. v. Vein Centers for Excellence, Inc.*, 2012 U.S. Dist. LEXIS 34294 at *10 (E.D. Mo. Mar. 14, 2012) (same).

In *Landsman & Funk PC v. Skinder-Strauss Associates*, 2012 WL 6622120 (D. N.J. Dec. 19, 2012), the court held that CPLR § 901(b) does not apply to a New York plaintiff's TCPA class action. As the court explained:

> In reaching its decision on the jurisdictional question, *Mims* laid the groundwork for how lower courts must interpret the TCPA's private-right-of-action clause. That clause, *Mims* says, speaks to *state* courts, and is an invitation to them to open their doors to aggrieved consumers who have been harassed by unsolicited phone calls and facsimiles, but without requiring them to do so. *See Mims*, 132 S.Ct. at 751. But *federal courts remain available as separate and independent fora for plaintiffs to vindicate their rights under this federal law*. The statute furthers the "federal interest in regulating telemarketing to 'protec[t] the privacy of individuals' while 'permit[ting] legitimate [commercial] practices.'" *Id.* (citations omitted). *Congress did not want to require "consumers ... to rely on 'the laws or rules of court of a State,' ... to gain redress for TCPA violations,"* which is why it created "detailed, uniform, federal substantive prescriptions." *Id.* (citations omitted). Consistent with *Mims*, *a federal court addressing a federal law that serves an important federal interest would be remiss were it to hold that a plaintiff's claim must be dismissed because of a state law.*

Id. at *6 (emphases added); *see also id.* at *8 (*Holster* has lost its persuasive authority among some district courts that have considered it after *Mims*," citing *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, 2012 WL 4903269 at *6 (D. N.J. Oct. 17, 2012), and *Jackson's Five Star Catering, Inc. v. Beason*, 2012 WL 3205526 at *4 (E.D. Mich. July 26, 2012).

In rejecting the defendant's motion for reconsideration, the *Landsman* court further explained:

> The court in *Holster* was tasked with determining whether the district court had jurisdiction over the plaintiff's TCPA class action, and, after a remand from the Supreme Court, affirmed the dismissal, adopting the reasoning employed in another case, *Bonime v. Avaya, Inc.*, 547 F.3d 497, 502 (2d Cir.2008): "This [private-right-of-action] provision constitutes *an express limitation on the TCPA which federal courts are required to respect*." *See Holster*, 618 F.3d at 217–18. *But [the defendant] has not offered a persuasive argument how such a conclusion is compatible with Mims' s statements that "by providing that private actions may be brought in state court if otherwise permitted by the laws or rules of court of [the] State, Congress arguably gave States leeway they would otherwise lack to decide for [themselves] whether to entertain claims under the [TCPA]," or how Holster' s reasoning comports with the Court's concern about the problematic situation where citizens of a state might have no forum at all in which to bring TCPA claims if the state courts shut their doors to them*. *Mims*, 132 S.Ct. at 751 & n. 13 (citations and internal quotation marks omitted). The Court's decision not to rely on the reasoning in *Holster* is not clearly erroneous and does not merit reconsideration.

Id. at *5 (emphases added).[1]

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[1] The history of the *Landsman* litigation is as follows:

> [I]n 2009, the [District] Court granted [the defendant]'s initial motion to dismiss, [the plaintiff] appealed to the Third Circuit, and a three judge panel vacated and remanded the case, *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 640 F.3d 72 (3d Cir.2011). Then the full Third Circuit Court of Appeals granted and subsequently vacated an *en banc* rehearing [*see* 650 F.3d 311 (2011)]. Meanwhile, the Supreme Court issued decisions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), concerning § 901(b)'s application in federal class actions, and *Mims v. Arrow Financial Services, LLC*, —— U.S. ——, 132 S.Ct. 740 (2012), concerning whether district courts have federal-question jurisdiction over TCPA actions. As a consequence, the Court of Appeals remanded the case to this Court in order to decide
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> > the effect that [the PROA Provision]'s "if otherwise permitted by laws or rules of court of a State" language has on ... federal TCPA class actions, i.e.,

In *Bridging Communities, Inc. v. Top Flite Financial, Inc.*, 2013 WL 185397 (E.D. Mich. Jan. 17, 2013), the court held that, under *Mims*, a Michigan rule that is virtually identical to CPLR § 901(b) was inapplicable to a TCPA class action, explaining that "[the] [d]efendant's . . . reliance on *Holster* as support for applying [the Michigan rule] is . . . fatal and fails because the Supreme Court [in *Mims*] has made it transparent that federal law governs." *Id.* at *6. As the court further observed, "the basis on which the *Holster* court relied for its holding, namely, its interpretation of Congress' intent behind its enactment of the TCPA, was viewed as flawed and effectively rejected by Mims." *Id.* at *3; *see also id.* at 4 ("[t]he *Holster* court's reasoning and holding, which would empower states to enforce the TCPA in federal courts, appears to be greatly undermined in the face of the *Mims* opinion."). *Accord*, *American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*, 2012 WL 3027953 at *2 (W.D. Mich. July 24, 2012); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 2012 U.S. Dist. LEXIS 85663 at *9-*10 (W.D. Mich. June 21, 2012).

In *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, 2012 WL 4903269 at *6 (D. N.J. Oct. 17, 2012), the court held that CPLR § 901(b) does not apply to a New York plaintiff's class

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> whether it subjects such actions to state-law limitations that would apply to similar suits filed in state court, and if so which ones. The District Court should consider the issue in light of *Mims* and *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010).
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> *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 09–3105, 2012 WL 2052685, at *1 (3d Cir. Apr.17, 2012).

Id. at *1-*2. Like the *Landsman* District Court ultimately held, the three-judge panel of the Third Circuit had likewise held that CPLR § 901(b) does not apply to a New York plaintiff's TCPA class action. *See Landsman & Funk*, 640 F.3d 72, 91 (3d Cir. 2011). Morover, the panel had reached that holding even though the panel had also held that TCPA claims may be brought in federal court *only* under diversity jurisdiction. *See id.* at 90.

action, noting that *Mims* "undermines the previous reasoning in the *Holster* decision . . . . [T]he reasoning in *Holster* prioritizing state interests in interpreting the law seems now greatly undermined in the face of the Supreme Court's consumer-oriented approach." *Id.* at *6-*7.

In *Jackson's Five Star Catering, Inc. v. Beason*, 2012 WL 3205526 (E.D. Mich. July 26, 2012), which also held that *Mims* precluded application of Michigan's counterpart to CPLR § 901(b), the court explained as follows:

> [T]he [d]efendants argue that Michigan Court Rule 3.501(a)(5) prohibits the maintenance of this [TCPA] claim as a class action. This Rule provides that "[a]n action for a penalty or a minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery as a class action." The question of how the [PROA Provision] interacts with various state statutes and rules has divided the courts. The [d]efendants rely upon *Holster v. Gatco, Inc.*, 618 F.3d 214 (2nd Cir. 2010), to argue that this class action may not be maintained. In *Holster*, the Second Circuit held that a New York statute which is similar to the Michigan Rule at issue here deprived federal courts of subject-matter jurisdiction over class actions that involve the [TCPA]. *Id.* at 216 ("Because [the TCPA] uses state law to define the federal cause of action, when the state refuses to recognize that cause of action, there remains [nothing] to which any grant of federal court jurisdiction could attach." (citation and internal quotation marks omitted)).
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> . . . *Holster* is not persuasive. Resolving an issue that had divided the circuits, the Supreme Court has recently held that "Congress did not deprive federal courts of federal-question jurisdiction over private [TCPA] suits." *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 747 (2012). This holding made clear that the state and federal courts possess concurrent jurisdiction over [TCPA] claims. A plain text reading of this statute shows that the phrase "if otherwise permitted by the laws or rules of court of a State" is a limitation on actions "[brought] in an appropriate court of that State." Section 227(b)(3) [*i.e*, the PROA Provision] allows states to close their courthouse doors to actions that the Supremacy Clause would otherwise require

> them to maintain, *see Hawk Valley v. Taylor*, No. 10-00804, 2012 WL 1079965, at *10 (E.D. Pa. Mar. 30, 2012) - but *does not speak to actions brought in the federal courts and does not require that state substantive law and procedural rules be imported into federal actions*. *See*, *e.g.*, *Weitzner v. Sanofi Pasteur, Inc.*, No. 11-2198, 2012 WL 1677340, at *3 (M.D. Pa. May 14, 2012); *Bailey v. Domino's Pizza, LLC*, __ F. Supp. 2d __, 2012 WL 1150882, at *6 (E.D. La. Apr. 5, 2012) (*"Section 227(b)(3)* [*i.e.*, the PROA Provision] *applies [TCPA] claims brought in state court but by its plain language does not reach a [TCPA] claim brought in federal court under federal-question jurisdiction."*). Therefore, the [d]efendants' claim that the Michigan Rule bars this action in federal court must be rejected.

Id. at *3-*4 (emphases added).

In *Hawk Valley, Inc. v. Taylor*, 2012 WL 1079965 at *19-*39 (E.D. Pa. Mar. 30, 2012), which held that federal law supplies the statute of limitations to TCPA claims in federal court, the court specifically explained that, in light of *Mims*, *Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 593 (2d Cir. 2011), *cert pet. granted vac'd, and remanded* for further consideration in light of *Mims*, 2012 WL 1884741, (U.S., No. 11-1411, Oct. 1, 2012), is no longer valid:

> . . . after *Mims*, it *cannot rightly be asserted that the TCPA is the functional equivalent of state law.*
>
> ***
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> . . . the Second Circuit Appeals Court considered "whether a state statute of limitations is among the 'laws' referenced in the TCPA's 'otherwise permitted' provision, or whether the statute of limitations for TCPA actions is the federal catch-all four-year limitations period provided in 28 U.S.C. § 1658(a)."[2] *Giovanniello*, 660 F.3d at 588. The Second Circuit Appeals Court held that

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[2] 28 U.S.C. § 1658(a) provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."

> [i]n the circumstances of this case, where the relevant state law specifically recognizes a cause of action for statutory damages for the transmission of unsolicited commercial facsimile ("fax") communications, but permits such an action to be filed only within two years of the complained-of transmission, we conclude that a TCPA action may be maintained only as permitted by that state statute of limitations.

Giovanniello, 660 F.3d at 588-589.

In reaching the conclusion that Section 1658's four-year limitations period did not apply to private TCPA actions, the Second Circuit Appeals Court reasoned that

> because Congress enacted the TCPA *primarily to fill a perceived jurisdictional gap* for states that choose to recognize a cause of action for unsolicited commercial faxes, it would be curious to assume that Congress intended for state courts (or federal courts exercising *diversity* [(emphasis added by Plaintiff)] jurisdiction) to apply a different limitations period[, the federal four-year catch-all period,] to TCPA claims than they apply to parallel state claims" arising from unsolicited fax advertisements.

Id. at 596 (emphasis added).

However, in *Mims*, the Supreme Court *rejected the contention that Congress "sought only to fill a gap in the States' enforcement capabilities*." *Mims*, 565 U.S. at , 132 S.Ct. at 751. Rather than a mere gap-filler, in enacting the TCPA Congress created "detailed, uniform, federal substantive prescriptions and provided for a regulatory regime administered by a federal agency....TCPA liability thus depends on violation of a federal statutory requirement or an FCC regulation...not on a violation of any state substantive law." *Id.*

With *Mims*' characterization of the TCPA in mind, I cannot conclude that the words "if otherwise permitted by the laws or rules of court of a State" in [the PROA Provision] represent Congress's intent, or are sufficient, to negate the applicability of Section 1658's four-year catch-all federal limitations period to private actions TCPA actions.

Id. at *34-*38 (emphases added; citations omitted).

In *Bailey v. Domino's Pizza, LLC*, 2012 WL 1150882 (E.D. La. Apr. 5, 2012), which also held that 28 U.S.C. § 1658(a) governs federal-court TCPA claims, the court recognized that the question regarding whether the statute of limitations for such claims is governed by state or federal law has been settled by *Mims*; and, in doing so, *Bailey* pointed out that the concurring opinion in *Bonime* had acknowledged that state-law restrictions would likely be inapplicable to TCPA claims if such claims were subject to federal-question jurisdiction:

> Acknowledging th[e] split [in the case law over whether there is federal-question jurisdiction over TCPA claims], Judge Calabresi concurred in *Bonime* and explained how the conflicting interpretations of [the PROA Provision] with respect to the jurisdictional question could dictate *different consequences with respect to the applicability of state law*:
>
>> Federal law (the TCPA's cause of action) directs courts to look to "the laws" and "rules of court" of a state. Thus, when a state refuses to recognize a cause of action, there remains no cause of action to which any grant of federal court jurisdiction could attach. It follows that Bonime's [class-action] suit must fail because Bonime lacks a cause of action on which to bring suit.
>>
>> ***This result derives inevitably from our cases, although it need not flow from every possible interpretation of the TCPA.*** The Seventh Circuit, for instance, has held that federal courts may exercise federal question jurisdiction over TCPA suits. *Brill* [*v. Countrywide Home Loans, Inc.*], 427 F.3d 446] at 451 [(7th Cir. 2005)]. In so doing, that court has read the language of [the PROA Provision] regarding state law and state courts as merely creating an alternative forum, rather than as foreclosing jurisdiction or relief in federal court. Indeed, the Seventh Circuit opined in *Brill* that its reading was required because "otherwise where

> would victims go if a state elected not to entertain these suits?" *Id.* ***On the Seventh Circuit's interpretation of the TCPA's private right of action, [Bonime]'s [class-action] suit might well be permissible.***
>
> 547 F.3d at 503-04 (Calabresi, J., concurring in judgment) (emphasis added).
>
> The *Bonime* concurrence recognized how the question of TCPA jurisdiction (now resolved by *Mims*) has *consequences for the question of state-law applicability*. The key language in [the PROA Provision] states that a plaintiff may, "***if otherwise permitted by the laws*** or rules of court ***of a State,*** bring ***in an appropriate court of that State***" a TCPA claim. *This language is directed at a cause of action brought in state court*. If state courts have exclusive jurisdiction over TCPA claims, then by its plain language [the PROA Provision] necessarily applies to the entire universe of TCPA claims. But *if there is concurrent federal and state-court jurisdiction*, then not every TCPA claim will be brought in a state court; *consequently, the state-centric language in* [the PROA Provision] *might not apply to TCPA claims brought in federal court pursuant to federal question jurisdiction*.

Bailey, 2012 U.S. Dist. LEXIS 48188 at *14-*16 (bold italics in original; other emphases added).

The *Bailey* court, in proceeded to make clear that *Mims* abrogated *Giovanniello*:

> *Mims* has vindicated the Seventh Circuit's approach [in *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446 (7th Cir. 2005), which had held that TCPA claims are subject to federal-question jurisdiction] and *Benedia* [*v. Super Fair Cellular, Inc.*, No. 07 C 01390, 2007 U.S. Dist. LEXIS 71911, 2007 WL 2903175 (N.D. Ill. Sept. 26, 2007)] is now worth another look. In *Benedia,* the court applied the 28 U.S.C. § 1658 four-year limitation period to a TCPA claim because there was no "express statute of limitations, *or a clear direction to consult state law" in the TCPA*. 2007 U.S. Dist. LEXIS 71911, [WL] at *2. The court examined [the PROA Provision] and found that it merely clarified that state courts also had jurisdiction over TCPA claims and some power to limit those claims in *state court,* without dictating limits on *federal courts*. *See* 2007 U.S. Dist. LEXIS 71911, [WL] at *2 (citing *Brill*, 427 F.3d at 451). "Accordingly, it is possible to give effect to the phrase 'if otherwise permitted by the laws or rules of

> court of a State' ***without applying to federal courts language directed to 'court[s] of a State'.*** " *Id.* (emphasis added).
>
> The Court agrees with the reasoning in *Benedia* and *Judge Calabresi's concurrence in Bonime.* The TCPA creates concurrent federal and state-court jurisdiction. [The PROA Provision] applies to TCPA claims brought *in state court* but by its plain language *does not reach a TCPA claim brought in federal court under federal-question jurisdiction*. Because [the PROA Provision] *does not apply to a federal-court TCPA claim*, it *does not import* [*state*] *law to displace the default four-year statute of limitations created by 28 U.S.C. § 1658.*

Id. at *16-*18 (bold italics in original; other emphases added).

CONCLUSION

Because this Court has federal-question jurisdiction over this action, and because this action is not subject to Section 901(b) of New York Civil Practice Law and Rules, Plaintiff respectfully requests that this Court, pursuant to Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure, issue an Order: (1) granting reconsideration of, and vacating, the Order of this Court, dated March 12, 2013, which *sua sponte* dismissed the Complaint based upon lack of subject-matter jurisdiction (D.E. 16); and (2) granting Plaintiff any additional relief authorized by law.

Dated: March 19, 2013

s/ ***Todd C. Bank***

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